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No. 83-891

In the Supreme Court of the United States

October Term, 1983

ROBERT J. CREASON, d/b/a KANSAS CARTAGE COMPANY,
Petitioner,

vs.

MO-KAN TEAMSTERS PENSION FUND, a trust fund, and MO-KAN TEAMSTERS HEALTH & WELFARE FUND, a trust fund,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Each of the "Questions Presented" as stated by Petitioner assumes that the contract involved in this case was a "prehire agreement" within the meaning of *Jim McNeff, Inc. v. Todd,* ..... U.S. ....., 75 L.Ed.2d 830, 103 S.Ct. 1753 (1983).

However, the Trial Court specifically found and concluded that the contract at issue was *not* a prehire agreement but was a voluntary legal collective bargaining agreement. The United States Court of Appeals for the Tenth Circuit agreed.

The Petitioner has, therefore, stated questions to this Court which *assume* a finding and conclusion contrary to the decisions of the Trial and Appellate Courts. To even consider the questions, this Court would first have to find that the Trial Court and Appellate Court erred in their determination that the involved contract was not a prehire agreement.

For these reasons, the "Questions Presented" by Petitioner are misleading and improper in that they assume facts and conclusions contrary to the findings and conclusions of the lower Courts. The "Questions Presented" as stated by Petitioner simply *do not exist* and there are no federal questions whatsoever presented for review by this Court.

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COUNTERSTATEMENT OF THE CASE

Respondents, Mo-Kan Teamsters Pension Fund and Mo-Kan Teamsters Health and Welfare Fund, are employee benefit plans created through the collective bargaining process between Teamsters Local Union No. 541 and the Builders Association of Missouri.

Petitioner, Robert Creason d/b/a Kansas Cartage, is and has been in the trucking business for approximately thirty (30) years.

Teamsters Local Union No. 541 and defendant had a long standing collective bargaining relationship prior to the dispute in this case. As early as March 28, 1955, defendant signed a collective bargaining contract with the Union, recognizing the Union as the representative of defendant's employees. Thereafter, defendant made contributions to another Pension and Welfare Fund as a result of his contract with Local 541 from 1957-1964. Karl Rogers, President of Local 541, verified information on an employee of defendant who was awarded a pension by the other Pension Fund.

Local 541 continued to represent defendant's employees by virtue of an oral agreement which was a prevalent practice at that time. Complaints by defendant's employees were handled by Local 541 on numerous occasions pursuant to the oral agreement. In March of 1971, Union Business Representative Robert Gillihan was visiting a Kansas City, Missouri job site at "Crown Center" and received complaints from defendant's employees regarding defendant's failure to pay the required wages and fringe benefits.

Defendant never questioned the majority status of the Union by filing an unfair labor practice charge.

At approximately this point in time, the plaintiff Funds came into existence. The Pension Fund was created effective January 1, 1970, and the Health and Welfare Fund effective January 1, 1971.

The prevailing practice in the industry at the time was operation pursuant to oral contract. After the creation of

the plaintiff Funds, the legal requirement of a written agreement to support contributions to the Funds required the Union to begin a process of obtaining written agreements with employers who had operated pursuant to an oral understanding.

Upon investigating the complaints of defendant's employees in March, 1971, Union Business Representative Gillihan learned that defendant had not yet signed a written agreement confirming their prior oral agreement. When Gillihan demanded that defendant execute a written agreement, defendant refused. A picket carried by one of defendant's employees followed this refusal.

Defendant contacted the Union in response to the picket and defendant met with Karl Rogers, President of Local 541, on March 15, 1971. At the meeting, defendant executed the Teamsters Local Union 541 Contract Stipulation agreeing to be bound by the master agreement between Local 541 and the Builders Association. Defendant was provided with a copy of the underlying Builders Association Agreement. Defendant claims he signed a Builders Association contract "under protest" rather than the Contract Stipulation. However, no executed copy of the Builders Association contract with the "under protest" was ever presented at trial.

Defendant claims that the written agreement was orally modified to cover only CECO work at Crown Center. However, Karl Rogers specifically denied that any such conversation ever occurred at the March 15, 1971 meeting.

Subsequent to executing the Contract Stipulation on March 15, 1971, defendant made fringe benefit contributions on some of his employees to the plaintiff Funds for

approximately five (5) years. Defendant discontinued contributions upon the initiation of this action.

During the period when defendant was making contributions to the Fund, the defendant prepared remittance reports wherein he represented who his employees were. The Union did not receive any complaints from defendant's employees during this period of time. During this time period, the Union averaged 4,500 members. Therefore, policing of employers was necessarily restricted by manpower to responding to employees' grievances when the Union was notified. The audit which initiated this action was one of the plaintiffs' methods of policing compliance with the fringe benefit portion of the Agreement.

SUMMARY OF ARGUMENT

Each of the questions and arguments presented by Petitioner deliberately misassumes that the contract in this case constituted a "prehire" agreement.

However, the Trial Court found and concluded that the contract was not a prehire agreement but rather was a collective bargaining agreement voluntarily executed by Petitioner based upon the desire of a majority of his employees for Union representation.

The "questions" presented for review by Petitioner, therefore, do not state any federal questions because they each assume the existence of a nonexistent prehire agreement.

In reality, Petitioner is simply asking this Court to review the trial transcript and determine that the Trial Court erred. Clearly this is not a function of this Court and certiorari should be denied.

ARGUMENT

I

No Question of Federal Law Is Presented

Petitioner claims that this case would allow the Supreme Court of the United States to determine what specific acts would effect the repudiation of a prehire agreement under its decision in *Jim McNeff, Inc. v. Todd*, ... U.S. ....., 75 L.Ed.2d 830, 103 S.Ct. 1753 (1983). Petitioner argues that such a determination is an important federal question.

Petitioner misses the mark in two respects. First, there is no prehire agreement involved in this case. Petitioner's statement of "Questions Presented", number one (1), conveniently assumes that a prehire agreement exists in this case, contrary to the lower Courts' determinations.

As the Court of Appeals for the Tenth Circuit noted:

> "The district court found that Creason was not an employer in the building and construction industry, but it also found the stipulation was not a prehire agreement. Rather, it held the stipulation to be "a contract in which defendant voluntarily recognized the desire of a majority of his current employees to be represented by Teamsters Local No. 541." (Appendix A6)

Therefore, there is no prehire agreement involved in this case. Correspondingly, no issue or question is presented as to what specific acts might constitute a repudiation of a prehire agreement.

Petitioner has attempted to mislead the Court by assuming facts and conclusions contrary to the lower Courts' decisions. What Petitioner is in reality requesting the Supreme Court to do is to review the transcript of the trial and come to a different conclusion than both the District Court and Appellate Court.

Alternatively, even if this case involved a prehire agreement, it would be impossible to foresee the multitude of different acts that could potentially constitute a "repudiation" under *Jim McNeff, Inc., supra.* This is, of course, exactly why this Court did not attempt to do so in the *McNeff* decision.

No issue of federal law is presented. Rather Petitioner simply seeks a second appellate review of the District Court's findings of fact and conclusions of law. Such a request does not constitute a special and important reason as required by Supreme Court Rule 19 to grant review.

II

The Decision of the Court of Appeals Affirming the District Court's Decision Is Not in Conflict With "Higdon". A Federal Question Under "Higdon" Does Not Exist

Petitioner next claims that a federal question was decided in conflict with the decision of this Court in *National Labor Relations Board v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, et al.*, 434 U.S. 335 (1978) ("Higdon").

Petitioner again misassumes that the contract involved was a prehire agreement, and argues that the District

Court erred by requiring Petitioner to show by "clear and convincing evidence that the union was not a majority union." Petitioner argues that placing such a burden of proof, or any burden of proof upon him is at odds with "Higdon". Said arguments are without merit for two reasons.

First (as stated in Section I of Respondents' Argument), there is no prehire agreement involved in this case. Petitioner has misassumed such a fact in an effort to obtain a second appellate review of the Trial Court's findings of fact and conclusions of law under the guise of deciding a federal question. Because there is no prehire agreement involved in this case, no federal question exists under "Higdon" and none was decided by the Trial Court.

Second, what the Trial Court did do (and what the Appellate Court approved) was to determine that the contract in this case was not a prehire agreement, but rather a voluntary contract entered into by Petitioner based upon majority support (Respondent's Argument Section I and Appendix A6).

Having determined that the contract was a voluntary collective bargaining agreement based upon majority support of Petitioner's employees for the Union, the Court then stated that "a presumption was created that a majority of the employees desired Union representation," citing *Arco Electric Co. v. NLRB*, 618 F.2d 698, 700 (10th Cir. 1980). This is in accord with established law.

The District Court thereafter concluded that having voluntarily recognized the Union and executed a collective bargaining agreement (giving rise to a legal presumption of its employees' desire for union representation) that Petitioner must produce "clear and convincing evidence" to

rebut the presumption. Both Courts concluded that Petitioner's evidence was inadequate to rebut the presumption and that lack of majority status is not a valid defense to a Section 301 action for enforcement of *accrued* contractual obligations.

This was a correct application of the law. Petitioner's arguments simply miss the mark because the nature and extent of the proof requirements relied upon by the lower Courts were not applied to a prehire or "Higdon" situation. The standards were applied in the context of a voluntary collective bargaining agreement entered into based upon majority status and the legal presumption which follows from such a relationship.

Therefore, Petitioner's arguments for review should be rejected.

III

The Contract Is Not Illegal Under This Court's Kaiser Decision Which Has No Application to This Case

Petitioner's last argument (Section II, B) asserts that if the Trial Court was correct in its determination that Petitioner was not primarily engaged in the building and construction industry, that the contract violates those sections of the National Labor Relations Act which prohibit prehire agreements except in the construction industry. Continuing, Petitioner argues that if the contract violates labor laws, it is unenforceable under this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

This argument is circuitous in its logic and again misses the point. As stated in Section I of Respondents' Argument, the lower Courts did indeed determine that the Petitioner was not engaged in the construction industry

and additionally, that the contract was a voluntary collective bargaining agreement based upon majority status.

Petitioner seems to assume that the voluntary execution of a collective bargaining agreement based upon employees' majority support for a union somehow violates the NLRA. Clearly this is not the law. Voluntary recognition is both legal and the predominant practice in labor relations.

The contract was not a prehire agreement and did not violate the NLRA. Therefore, *Kaiser* is simply not applicable.

Even assuming arguendo that *Kaiser* does apply, the Appellate Court was correct in concluding that the Petitioner has misconstrued the meaning of *Kaiser* and that *McNeff* makes it clear that lack of majority status may not be asserted as a defense to a Section 301 action for enforcement of accrued contractual obligations. Appendix A7)

CONCLUSION

Certiorari should be denied. Petitioner has failed to show the existence of any federal question whatsoever but rather requests an additional appellate review of the Trial Court's findings of fact and conclusions of law. Therefore, there is no special and/or important reason to grant certiorari.

Respectfully submitted,

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